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NO. 82-1423

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

BOB EDDY, etc., et al.,

Petitioners,

v.

CAROLYN N. HESS, etc.,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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OTHER AUTHORITIES

6 Wright & Miller, Federal Practice and Procedure, sec. 1501, at pp. 523-524. 2

ARGUMENT

On October 21, 1982, the United States Court of Appeals for the Eleventh Circuit ruled that the Plaintiff's Complaint filed with the United States District Court for the Northern District of Alabama was improperly dismissed. The ruling was reversed and remanded.

The Court of Appeals took the proper action, and its ruling should stand.

The law of the State of Alabama is clear that the doctrine of relation back should bar the Defendants from successfully using the statute of limitations as a defense to the late qualification by the Plaintiff as Administrator of her deceased husband's estate. In Manning v. Zapata, 350 So.2d 1045 (1977), the Court of Civil Appeals of the State of Alabama reviewed an insurance subrogation case. The law suit

was filed within the period of the applicable one year statute of limitations, but 19 months after the accident the Plaintiff insurance company moved to amend the complaint by substituting one insurance company (the proper insurer) for another (the original party) as the real party in interest. The trial court allowed the amendment but ruled that it would not relate back to be effective within the one year period of the statute of limitations. The Court of Civil Appeals reversed the trial court, holding that the claim was not barred by the statute of limitations since no new cause of action was asserted. At page 1047, the Court quotes 6 Wright & Miller, Federal Practice and Procedure, sec. 1501, at pp. 523-524: ". . . As long as the Defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the

action against him, his ability to protect himself will not be prejudicially affected if a new Plaintiff is added, and he should not be permitted to invoke a limitations defense. This seems particularly sound inasmuch as the court will require the scope of the amended pleading to stay within the ambit of the conduct, transaction, or occurrence set forth in the original pleading . . . . The courts seem to concentrate on these notice and indentity of interest factors as they do in the case of amendments changing defendants. Thus, an amendment substituting a new plaintiff has been held to relate back if the added plaintiff is the real party in interest . . ." At page 1047, the Court said that "identity of interest" between plaintiffs would exist where there was "a substantial relationship between the old and new parties with regard to the litigation, as well as a sufficiently

analogous legal position within the law suit to preclude the assertion of a new cause of action."

The Alabama Court of Civil Appeals spoke about the same question in Board of Water and Sewer Commissioners of the City of Mobile v. McDonald, 322 So.2d 717 (1975). In that case, the Plaintiff sued the Board for payment of money allegedly owed to the Plaintiff. After the applicable ten year period (statute of limitations) had expired, the Plaintiff's wife was substituted as the proper Plaintiff, when it was determined that she was actually the real party in interest. The Board argued that to allow this amendment and substitution of Plaintiffs to "relate back" would deny it the opportunity to assert the statute of limitations as a defense, but the Court of Civil Appeals said: "The purpose of the rules to effect justice upon the merits of the claim and to renounce technicality of procedure is markedly evident from the last two

sentences of Rule 15(b). These sentences are as follows:

> 'An amendment shall not be refused under subdivision (a) and (b) of this rule solely because it adds a claim or defense, changes a claim or defense, or works a complete change in parties. The court is to be liberal in granting permission to amend when justice so requires.'"

At page 721, the Court said, "An amendment changing parties plaintiff relates back if the claim of the new party arose out of the same transaction, conduct, or occurrence as that set forth in the original pleading, and if the defendant, within the period provided by law for commencing the action against him (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the substituted or joined party would have brought the action against

him." The trial court's decision in allowing the amendment to relate back was affirmed.

The Supreme Court of Alabama discussed relation back in Birmingham Gas Co. v. Sanford, 145 So. 485 (1932). In that case, a one year statute of limitations was involved, and the Plaintiff's wife was added as a party Plaintiff after the expiration of the appropriate one year period. The Defendant raised the limitation defense, but the Supreme Court affirmed the trial court's action in allowing an amendment. At page 488, the Supreme Court of Alabama said, "Our own court, in the earliest history of the amendment statutes, both at law and in equity, took the position that these statutes were intended to accomplish just and salutory purposes, to discourage technical objections, and to secure a trial on the merits of each controversy; and to that end, we have uniformly held that our amendment statute should be liberally construed."

The Supreme Court then recognized that the amendment which added the Wife did not state a new cause of action but that the identical cause of action existed after the amendment, and, therefore, the amendment should relate back to the commencement of the suit.

The Defendants in the case now before the Court rely for their authority almost exclusively upon the case of Downtown Nursing Home, Inc. v. Poole, 375 So.2d 465 (1979). In the Nursing Home case, one person sought qualification as administrator of the deceased's estate, but was not actually qualified as administrator before the statute of limitations expired. After the law suit was filed and after the limitations period had expired, a second person asked to be qualified and was actually appointed as the personal representative of the deceased. The original filer of the suit was not qualified.

It is submitted that the Nursing Home case is not "on all fours" with the case now

being argued; in the instant case, the Plaintiff did ultimately receive her qualification as personal representative, and there was a base established prior to the expiration of the limitation period to which an amendment could relate (in the Nursing Home case there was no such opportunity for the doctrine of relation back to occur since the original filer of the suit was not the person who was qualified as the real party in interest); the Nursing Home case alleged a cause of action based entirely upon state law, and 42 U.S.C.A. sec. 1983 and 1988, along with their underlying historical direction, were not involved.

In the article "Running of Statute of Limitations as Affected by Doctrine of Relation Back of Appointment of Administrator" 3 ALR3rd 1234, it is stated that "In the great majority of cases that have considered the doctrine of relation back of the appointment of an administrator as it might affect

the running of the statute of limitations, it has been held that such an appointment made after the statute has run against a claim will relate back to validate actions taken on the claim within the statutory period by the person subsequently appointed administrator, thus barring reliance upon the defense of limitations by the party against whom the claim is asserted on behalf of the estate. Such result has been reached in wrongful death actions as well as in other types of actions."

In summary, the Supreme Court of the United States should refuse to grant certiorari for the following reasons:

A. The Court of Appeals acted properly.

B. There was proper application of the doctrine of relation back; the facts in this case are different, not "on all fours," with the facts in the Nursing Home case.

C. The granting of certiorari would serve to recognize a bare technical defect, the failure to obtain qualification for the Plaintiff as personal representative of her husband's estate, prior to the filing of the

law suit concerned. This defect would not exist if my father had not unexpectedly died of a sudden heart attack a matter of hours prior to the time when the law suit was filed.

D. The reason for the defect gives the Court occasion to speak about the future of our profession. Should opportunist attorneys be able to thwart the interests of justice by exploiting another attorney's personal tragedy, or should the courts recognize that the continuing evolution of our theories of justice require that bare technical defects should be subordinated to the interests of deciding claims upon their factual merits, regardless of the presence of insignificant technical defects which bear no relation to "guilt" or "innocence?"

E. The Defendants will not be prejudiced, because their attorneys, by their own admissions, had kept a file on the case from the date when the claim arose until the date when the law suit was filed. This is not a "stale claim" which the Defendants are unprepared to defend.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been served upon each attorney of record for all parties in this case by placing a copy of same in the United States Mail, properly addressed and postage prepaid, this the 19th day of May, 1983.

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